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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR BROOKS, Defendant and Appellant.	C086273 (Super. Ct. No. 17FE010678)

Defendant Arthur Brooks appeals his convictions for assault with a deadly weapon and spousal abuse. He contends the trial court abused its discretion in admitting evidence of his prior act of domestic violence under Evidence Code section 1109.[1] Recognizing trial counsel did not object to the admission of this evidence, defendant argues he received ineffective assistance of counsel. In supplemental briefing, defendant also argues this matter must be remanded to the trial court for resentencing to allow the trial

[1] Undesignated statutory references are to the Evidence Code.

court to exercise its discretion to strike the prior conviction enhancement under Penal Code section 667, subdivision (a)(1). We find defendant's evidentiary claim forfeited because of the failure to object, counsel was not ineffective for failing to object, and remand for resentencing would be futile. Accordingly, we affirm the judgment.

I. BACKGROUND

In June 2017, defendant and Danielle were at her apartment with their two children. They were in the children's room when they began arguing. Danielle asked defendant to leave. Defendant refused. Defendant then began punching and kicking her all over her body. Defendant left the room, returned with a metal broom, and beat Danielle with the handle of the broomstick. While he was beating her with the broomstick, the broom head broke off and left a jagged edge at the end of the handle. As Danielle tried to defend herself, she put her hands up and the jagged edge of the broomstick sliced her thumb, leaving a v-shaped laceration. Danielle also scratched defendant's nose. It was bleeding, and she told him to go look at his nose. When he left the room to look in the mirror, she ran toward the front door. Defendant grabbed her, tried to pull her back into the apartment, and shoved her. She fell and hit a tree root in front of the apartment. The injury to Danielle's thumb required stitches. Danielle had contusions on her right leg that looked like they were from a long cylindrical item, not punches. She also sustained an abrasion to her forehead.

The property manager called 911 and handed Danielle the phone. Danielle reported her finger was cut, defendant had her child, and was armed and dangerous. She gave the dispatcher defendant's name, a physical description, and advised that defendant was wearing an ankle monitor. Danielle told the responding officer defendant had kicked and punched her and beaten her with a broomstick. The evidence at the scene was consistent with her statements. Law enforcement officers took defendant into custody shortly thereafter. Danielle reported to the emergency room doctor that she had sustained these injuries from being struck with a broken broomstick by defendant.

Over the course of several phone calls while defendant was in jail, Danielle said she had gotten more than 25 stitches in her finger and that she would make defendant pay for what he did to her; that he beat her and cut her finger open in front of her daughter; that she would tell the judge about the years of abuse and the "Taco Bell situation"; and that police officers photographed the bloody broomstick.

At trial, Danielle recanted her allegations. She claimed she was off her mental health medications and had suffered a psychotic break. She testified she had confronted defendant about a phone call she had gotten from another woman and they started arguing. She grabbed scissors and started to jab them at him. She was unsure if that was when she cut his nose. Then she realized her finger was cut. Defendant threatened to take her children away and she started chasing him with the broom.

David Cropp testified as an expert in domestic violence. Cropp testified about the cycle of domestic violence: tension building and appeasement, acute abuse, and the honeymoon and contrition phase. He also testified it is common for victims to recant and refuse to cooperate with prosecution.

Without objection, the trial court also admitted evidence of a prior uncharged act of domestic violence under sections 1109 and 352.

About six months prior to the charged incident, defendant, Danielle, and their infant daughter went to a Taco Bell drive-thru. Three Taco Bell employees reported they had seen defendant hit Danielle in the head with an open two-liter soda bottle at least 10 times and then punch her in the face 20 to 30 times before trying to kick her out of the car. Danielle kept screaming for defendant to let her get the baby out of the car. Defendant yelled profanities at her, calling her a "stupid bitch," and she kept yelling, " 'My head, my head, please stop.' " A Taco Bell employee called the Sacramento Police Department and reported an assault in progress. An officer arrived at the scene within about five minutes after the call came in. The officer did not observe any physical injuries to Danielle.

At trial, Danielle denied any history of domestic violence between defendant and herself. She denied defendant had hit her at a Taco Bell in December 2016, both at the time of the assault and at trial.

The prosecution filed a second amended information charging defendant with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)—count one) and corporal injury resulting in a traumatic condition upon a person who was the parent of defendant's children (Pen. Code, § 273.5, subd. (a)—count two), with an enhancement allegation that defendant personally used a deadly or dangerous weapon in the commission of the offense (Pen. Code, § 12022, subd. (b)(1)). The information further alleged that defendant had been convicted of a serious felony (Pen. Code, §§ 1170.12, 667, subds. (b)-(i), 667 subd. (a)), and had served three prior prison terms (Pen. Code, § 667.5, subd. (b)).

A jury found defendant guilty on both counts and found the personal use of a weapon allegation true. In bifurcated proceedings, the trial court dismissed one of the alleged prior prison terms and found the remaining prior conviction allegations true. The trial court sentenced defendant to an aggregate term of 16 years and awarded him 425 days of presentence custody credits.

II. DISCUSSION

A. Prior Uncharged Act of Domestic Violence

Defendant contends the trial court committed reversible error in admitting the evidence of the prior uncharged act of domestic violence at the Taco Bell under section 1109. He argues the evidence was inflammatory and more prejudicial than probative. Because defense counsel did not raise this objection in the trial court, the issue is not preserved for appellate review. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1124.)

Recognizing counsel did not object to the admission of this evidence, defendant also contends he received ineffective assistance of counsel. We are not persuaded.

To prevail on his claim of ineffective assistance of counsel, defendant must show: (1) that his counsel's representation was deficient, i.e., that it "fell below an objective standard of reasonableness" and (2) that prejudice resulted, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [80 L.Ed.2d 674] (*Strickland*).) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) We conclude defendant has not shown defense counsel was deficient in failing to object to the prosecution's use of the prior uncharged act of domestic violence under section 1109. Counsel cannot be criticized for failing to lodge meritless objections or undertake fruitless action. (See *People v. Foster* (1993) 14 Cal.App.4th 939, 954-955; *People v. McCutcheon* (1986) 187 Cal.App.3d 552, 558-559.)

Section 1109, subdivision (a)(1) permits evidence of other acts of domestic violence to show propensity for domestic violence, so long as the evidence is not made inadmissible by section 352. Section 352 renders such evidence inadmissible when the prejudicial impact substantially outweighs probative value. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531 (*Johnson*).)

The principal factor affecting probative value is the uncharged act's similarity to the charged offense. (*Johnson, supra*, 185 Cal.App.4th at p. 531.) In this context, prejudice is evidence that will consume an undue amount of time, confuse issues, mislead the jury or create a substantial danger of undue prejudice. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.) Undue prejudice is " ' "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues," ' not the prejudice 'that naturally flows from relevant, highly probative evidence.' " (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) "Relevant factors in

determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s)." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

The evidence here was probative, and defendant does not argue otherwise. Domestic violence is typically repetitive and similar domestic violence offenses are uniquely probative of guilt. (*Johnson, supra*, 185 Cal.App.4th at p. 532.) The acts were similar as both involved defendant arguing with Danielle, hitting her with his fists, and using an object to further beat her. Contrary to defendant's argument, the evidence was not unduly prejudicial. Although defendant had not been punished for the Taco Bell offense, that factor alone does not warrant a conclusion that the evidence was unduly prejudicial. The charged offense was as inflammatory as any of the evidence regarding the uncharged offenses. Defendant was charged with repeatedly punching and kicking Danielle, and beating her with a metal broomstick causing multiple contusions on her leg and injuries to her thumb, which required medical treatment and stitches. The prior act resulted in no apparent injuries. The prior act evidence did not take an undue amount of time and the incident was not remote, occurring just a few months before the charged act. "Also weighing in favor of admissibility," three independent eye witnesses testified briefly as to the uncharged event. (*Id.* at p. 533.)

The evidence of the prior uncharged act was admissible; thus, trial counsel's decision not to object to its admission did not fall below an objective standard of reasonableness. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1202 ["trial counsel . . . have no duty to object simply to generate appellate issues"]; see also *People v. Thompson* (2010) 49 Cal.4th 79, 122 ["[c]ounsel . . . not ineffective for failing to make frivolous or futile motions"].) Because we find defendant has not met his burden with respect to the first prong of the *Strickland* test—that his counsel's performance "fell below an objective

standard of reasonableness"—we need not address the second prong. (*Strickland, supra*, 466 U.S. at p. 688.)

B. Senate Bill No. 1393

In supplemental briefing, defendant contends that the enactment of Senate Bill No. 1393 (2017-2018 Reg. Sess.), giving the trial court discretion to consider dismissing his Penal Code section 667, subdivision (a)(1) prior serious felony enhancement, requires we remand to allow the court to exercise its newly-granted discretion. The People contend remand is "unwarranted because the trial court clearly indicated it would not have dismissed the serious felony enhancement even if it had" the discretion.

At the sentencing hearing, the trial court noted the probation report did not add in the five-year prior under Penal Code section 667, subdivision (a)(1). Defense counsel agreed it was omitted, but asked the court to stay the five-year prior. The court responded, "I don't think I can. But if I could, I wouldn't."

When a change in the law grants a trial court discretion to strike a previously mandatory enhancement that the trial court has already imposed, remand for resentencing is required "unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement," even if it had the discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Because the trial court clearly indicated it would not strike the five-year enhancement, remand is unnecessary.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

HOCH, J.